

USDOL/OALJ Reporter

[*Honardoost v. PECO Energy Co.*](#), ARB 01-030, ALJ No. 2000-ERA-36 (ARB Mar. 25, 2003)

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



ARB CASE NO. 01-030
ALJ CASE NO. 00-ERA-36
DATE: March 25, 2003

In the Matter of:

ABBAS HONARDOOST,
COMPLAINANT,

v.

PECO ENERGY COMPANY,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Abbas Honardoost, *pro se*, Airville, Pennsylvania

For the Respondent:

Mark B. Peabody, Esq., *PECO Energy Company, Philadelphia, Pennsylvania*

FINAL DECISION AND ORDER

The Complainant, Abbas Honardoost, filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that his former employer, PECO Energy Company, retaliated against him in violation of the whistleblower protection provisions of the Energy Reorganization Act, 42 U.S.C.A. § 5851 (West 1995) and its implementing regulations at 29 C.F.R. Part 24 (2002). A Department of Labor Administrative Law Judge (ALJ) issued a recommended decision granting PECO's Motion to Dismiss (R. D. & O.). For the following reasons, the Administrative Review Board agrees that the complaint must be dismissed.

Background

In a complaint dated June 30, 2000, Honardoost alleged that PECO forced him to resign from his position as a PSM Design Engineer at the Peach Bottom Atomic Power station in retaliation for raising potential safety concerns to PECO management and the Nuclear Regulatory Agency in 1996. R. D. & O. at 1, 6; Complaint at 1. Describing the nature of the retaliation, Honardoost averred that PECO forced him to participate in its involuntary Force Reduction Program even though the criteria for such involuntary participation did not apply to him and that he was the only PSM Design engineer in the Peach Bottom Site who "was selected as excess under the 'program.'" Complaint at 1.

[Page 2]

OSHA determined that Honardoost's allegations could not be substantiated because it found that Honardoost had failed to file a timely complaint within 180 days of the alleged adverse action, *i.e.*, the alleged involuntary separation and retirement. Letter from William D. Seguin, Regional Supervisory Investigator dated August 30, 2000; R. D. & O. at 1-2.

Honardoost requested review of OSHA's determination, and the case was referred to a Department of Labor ALJ for review.

ALJ Proceedings

On November 9, 2000, PECO filed with the ALJ a Motion to Dismiss Complaint and Memorandum and documents in support of the Motion. PECO argued in its Memorandum that the case should be summarily dismissed on two grounds. First PECO argued that Honardoost did not timely file the complaint. In support of this argument, PECO relied upon the PSM Election Form that Honardoost signed on October 26, 1999, which stated, "I elect to participate in the Program and separate from PECO Energy [as of June 30, 2000] with the enhanced separation benefits available to me under the Program, and I elect to retire from Energy with enhanced retirement benefits." The Form further stated,

I understand that in exchange for my receiving enhanced benefits under the 1998 Workforce Reduction Program . . . I will be required to sign the attached Full Waiver and Release of Claims. I understand that I will be given 45 days to review the full Waiver and Release of Claims, and that if I choose not to sign the Release I will be terminated without any [enhanced] retirement or separation benefits.

PECO Documents (P. D.) Tab 5. PECO argued that the 180-day limitation period for filing a complaint, as provided in 42 U.S.C.A. § 5851 (b)(1), began to run on October 26, 1999, because as of that date Honardoost was unequivocally aware of the termination of his employment, the alleged adverse action. PECO also contended that the complaint should be dismissed because Honardoost could not make a *prima facie* showing of retaliatory discharge. PECO's Memorandum (PECO Mem.) at 6-7.

Finally, PECO averred that it had presented clear and convincing evidence that Honardoost's 1996 NRC complaint was not a contributing factor in his separation from PECO under the Workforce Reduction Program. PECO stated that Honardoost could not present any credible evidence regarding his work history, his participation in the Workforce Reduction Program, or his eventual separation, from which even an inference of retaliatory conduct could be raised. In support of this argument, PECO cited to a number of positive decisions regarding Honardoost's employment that it made after the 1996 NRC complaint, including annual bonus awards, positive annual performance evaluations (Tab 8), a promotion (Tab 9), significant and continuous training (Tab 10) and a message of appreciation and a Quality Recognition Award. PECO also cited to comments Honardoost had made himself regarding the quality of his supervision in response to his performance evaluations (Tab 8).

[Page 3]

In response, Honardoost made two points. First, Honardoost stated that the NRC was currently investigating whether PECO discriminated against him regarding the termination of his employment. Second, "on the issue that the complaint was not filed timely," Honardoost stated that PECO had reduced his monthly life annuity benefit twice since the initial estimate. Reply to Motion to Dismiss at 1. He declared that he believed that "my complaint of June 30, 2000 . . . is within the time frame of 180 days considering the notifications for my reduction of annuity payment of June 2000." *Id.* at 2. Honardoost attached to his reply a copy of the PSM Election Form and three Workforce Reduction Program Personalized Benefit Estimate Sheet Updates, the first showing a Single Life Annuity of \$1,147.85, the second showing an Annuity benefit of \$1,129.83 and the third, a benefit of \$1,119.61.

ALJ's R. D. & O.

First, the ALJ found that Honardoost's complaint that PECO involuntarily terminated his employment was untimely filed because Honardoost received final, definitive and unequivocal notice of the alleged adverse employment action on October 26, 1999, when he signed the PSM Election Form. R. D. & O. at 3-4.

The ALJ then treated PECO's Motion to Dismiss as a Motion for Summary Decision under 29 C.F.R. § 18.40.¹ *Id.* at 4-5. Ultimately, the ALJ determined that Honardoost had failed to establish an essential element of his case, *i.e.*, that the "protected activity was the likely reason for the adverse employment action" because Honardoost "proffered no evidence to account for the lapse in time between the protected activity and the adverse action." *Id.*

Honardoost filed a timely Petition for Review with the Board.

Issues Presented for Review

1) Whether Honardoost's complaint was untimely filed because, as PECO alleges, the PSM Election Form that Honardoost signed on October 26, 1999, unequivocally notified Honardoost of the impending termination of his employment, the alleged adverse action, and Honardoost filed his complaint more than 180 days after he received the notification.

2) Whether PECO, in support of its Motion to Dismiss, has carried its burden of establishing that there are no genuine issues as to any material fact and the evidence is such that a reasonable fact finder can only find for PECO.

Standard of Review

The Board reviews an ALJ's recommended grant of summary decision *de novo*, i.e., the same standard that the ALJ applies in initially evaluating a motion for summary judgment governs our review. *Erickson v. U.S. Environmental Protection Agency*, ARB No. 99-095, ALJ No. 99-CAA-2, slip op. at 3 n.3 (ARB July 31, 2001). See 29 C.F.R. § 18.40(d). Accordingly, the Board will affirm an ALJ's recommendation that summary decision be granted if, upon review of the evidence in the light most favorable to the non-moving party, we conclude that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law. *Erickson v. U.S. Environmental Protection Agency*, slip op. at 4-5. *Accord Federal Home Loan Mortgage Corp. v. Scottsdale Insurance Co.*, 316 F.3d 431, 443 (3d Cir. 2003).

[Page 4]

Discussion

Timeliness of the complaint

Pursuant to 42 U.S.C.A. § 5851(b)(1), an employee who believes that his employer has discriminated against him in violation of the ERA's whistleblower protection provisions² may file a complaint with the Secretary of Labor within 180 days after the alleged violation has occurred. The 180-day period for filing an ERA complaint begins to run on the date that a complainant receives a "final and unequivocal" notice of the alleged adverse actions rather than at the time the complainant ultimately experiences the effects of the actions. *Wagerle v. The Hosp. of the Univ. of Pa.*, No. 93-ERA-1, slip op. at 3-6 (Sec'y Mar. 17, 1995), citing *English v. Whitfield*, 858 F.2d 957, 962 (4th Cir. 1988). *Accord Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980); *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 855-856 (3d Cir. 2000). In determining whether the complainant timely filed the complaint, it is necessary first to identify the precise alleged unlawful action. *Watson*, 235 F.3d at 855.

In this case, Honardoost stated in his complaint that PECO discriminated against him by involuntarily terminating his employment. PECO, in its Motion to Dismiss, argued that it gave Honardoost "final and unequivocal" notice of his termination on October 26, 1999, when Honardoost signed the PSM Election Form indicating that he would separate and retire from employment on June 30, 2000, and that if he failed to sign the full Waiver

and Release of Claims, PECO would terminate his employment without any enhanced retirement or separation benefits. PECO Mem. at 5-6. Based on the October 26th date, Honardoost's complaint was untimely.

Honardoost's argument, in reply to PECO's contention that his complaint was untimely, is not completely clear. However, it appears that Honardoost's position is that because PECO amended the initial estimate of Honardoost's monthly annuity benefit twice after the initial notice of the estimated benefit, the notice of termination contained in the October 26th PSM Election Form was not "final and unequivocal." This argument was somewhat clarified in the Rebuttal Brief he filed with the Board in which he stated:

I argue in the alternative that June 20, 2000, the date of last change to the three adversely revised Annuity Payment statements or May 20, 2000, the date on which the Release of Claim signed on (October 26, 1999) was voided and a new Release of Claim was subsequently signed should be the proper date for the start of the time limitation period, because those changes made to my annuity payment and Waiver of Release Indicate the Election form and Waiver of Release signed on (October 26, 1999) was not a final and definitive notice and in fact they were subject to further changes and discussion.

Rebuttal brief at 2 (emphasis in original). Honardoost stated in his complaint that the "precise alleged unlawful action," *Watson*, 235 F.3d at 855, was PECO's termination of his employment. That Honardoost's employment would be terminated as of June 30, 2000, regardless whether he signed the Waiver of Release, is incontestably certain. Therefore although the estimate of the size of his annuity changed, the determinative fact of his termination remained unequivocal and unchanged after October 26, 1999, regardless whether he signed or refused to sign the Waiver and whether the amount of the annuity was "subject to further changes and discussion." Therefore we agree with the ALJ that Honardoost failed to file a timely complaint alleging an unlawful termination as provided in 42 U.S.C.A. § 5851 (b)(1).³

[Page 5]

Issues of material fact

Pursuant to the regulations establishing summary decision procedures applicable to ERA cases:

The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

29 C.F.R. § 18.40(d). When a party moves for summary judgment, "a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). If a party fails to establish "the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment is mandated. *Watson*, 235 F.3d at 857-858, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

To prevail on a claim of retaliation under the ERA, a complainant must establish "that he engaged in protected activity which was a contributing factor in the unfavorable personnel action alleged in the complaint." *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 5 (ARB Nov. 13, 2002). In this case, PECO conceded for purposes of argument, and the ALJ found that Honardoost engaged in protected activity, that PECO was aware of the activity and that he sustained an unfavorable personnel action when his employment was terminated. PECO's Mem. at 6 n.10; R. D. & O. at 6-7. However, we find that Honardoost did not successfully oppose the motion to dismiss because he failed to proffer any disputed material facts that, if proven, would establish that his employment was terminated because he engaged in protected activity. R. D. & O. at 7; Honardoost's Reply to Motion to Dismiss at 1. Essentially, Honardoost argues that because he engaged in protected activity and his employment was terminated, there is necessarily a causal connection between the two actions. This bald conclusory assumption, without any allegation of supporting material facts, is simply insufficient to carry Honardoost's burden in opposing a motion for summary judgment. *Accord Hasan v. United States Dep't of Labor*, 298 F.3d 914, 917 (2002).

Honardoost's failure to allege the existence of such supporting facts is especially fatal to his cause in this case because of the four-year gap between the protected behavior and the adverse action. While temporal proximity (or the absence of proximity) does not alone dictate whether an adverse action was retaliatory, "the passage of time between the protected activity and adverse action plainly mitigates against the likelihood of retaliation." *Erickson v. U.S. Environmental Protection Agency*, slip op. at 5. This is particularly true in a case like this in which the complainant has failed to allege any facts that would establish, if proven, that the employer took the adverse action in retaliation for protected activity. See e.g., *Shusterman v. Ebasco Services, Inc.*, 87-ERA-27, slip op. at 9 (Sec'y Jan. 6, 1992)("I conclude that the four-year interval, without credible evidence to the contrary, establishes the absence of any causal connection between Complaint's vendor evaluation [the protected activity] and his discharge [the adverse action].").⁴

[Page 6]

Finally, the ALJ concluded that Honardoost had alleged in his Reply to the Motion to Dismiss that the reduction in monthly annuity benefits was a separate adverse action. R. D. & O. at 7. The ALJ rejected this argument on the grounds that the initial benefit calculation was just an estimate. *Id.* As indicated previously at 5, we have concluded that

it is more likely that, before the ALJ, Honardoost was simply arguing that the PSM Election Form did not give Honardoost "final and unequivocal" notice of his termination on October 26, 1996, because the annuity benefit calculation was amended. However, even assuming that Honardoost filed a complaint alleging that the reduction in annuity benefits was an independent adverse action and that such complaint was timely, we conclude that Honardoost has failed to allege material facts that, if proven, would establish that the reduction in annuity benefits was in retaliation for protected activity. PECO has explained that the \$28.24 reduction in the monthly benefit from the initial estimate was caused by an error in calculation and a change in accounting practices. Tab 11. Honardoost's only reply is that because the amount was reduced, the reduction must be the result of unlawful retaliation. As we held above, such unsupported bald conclusions are not sufficient to successfully oppose a motion for summary judgment.

Conclusion

Because we find that Honardoost failed to file a timely complaint and that Honardoost failed to successfully oppose PECO's Motion to Dismiss by establishing that there are genuine issues as to any material fact, we **affirm** the ALJ's R. D. & O. and **DISMISS** Honardoost's complaint

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[ENDNOTES]

¹ Because PECO submitted evidence outside the pleadings in support of its Motion to Dismiss, PECO's Motion is considered a motion for summary decision under 29 C.F.R. § 18.40. *See Erickson v. U.S. Environmental Protection Agency*, ARB No. 99-095, ALJ No. 99-CAA-2, slip op. at 3 n.3 (ARB July 31, 2001). Office of Administrative Law Judges Rules 18.40 and 18.41 (29 C.F.R. §§ 18.40 and 18.41) govern the disposition of motions for summary decision before ALJs. *Id* These rules are modeled on Rule 56 of the Federal Rules of Civil Procedure, and the standard for granting summary decision under the OALJ rules is essentially the same standard applicable to granting summary judgment under Federal Rule 56. *Id*.

² As provided in pertinent part in 42 U.S.C.A § 5851(a)(1):

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions or privileges of employment because the employee . . .
(A) notified his employer of an alleged violation of this chapter or the

Atomic Energy Act of 1954 . . . or
(F) assisted or participated . . . in any . . . action to carry out the purposes
of this chapter or the Atomic Energy Act of 1954, as amended.

³ Although the ALJ subsequently found that Honardoost also alleged that the reduction in annuity benefits itself was an independent adverse action, R. D. & O. at 7, he did not discuss the timeliness of any complaint alleging such adverse action. Because we hold that, in any event, Honardoost failed to allege any material facts, that if proven, would establish that PECO reduced the annuity estimate in retaliation for protected activity, see discussion at 7-8, we do not address the issue whether any complaint based upon the reduction in annuity benefits was timely.

We also note that Honardoost raised two additional arguments in his Opening Brief, in regard to the timeliness of his claim. He argued that he was given a final separation date more than 180 days after the date on which he signed the separation form so that he could not timely file his complaint. Opening Brief at 7. He also argued that, as provided in 29 C.F.R. § 24.2(d)(1), the 180-day period did not begin to run on October 26, 1999, because PECO failed to post the OSHA notice informing employees of their rights under the whistleblower provisions. *Id.* Because Honardoost raised these arguments for the first time on appeal to the Board, we decline to consider them. *Duprey v. Florida Power & Light*, No. 00-070, ALJ No. 2000-ERA-5, slip op. at 11 n.54 (Feb. 27, 2003); *Hasan v. Wolfe Creek Nuclear Operating Corp.* ARB No. 01-006, ALJ No. 2000-ERA-14, slip op. at 4 n.4 (ARB May 31 2001).

⁴ We also note that Honardoost has identified for the first time in his Opening Brief, a number of additional alleged adverse actions, which he states that PECO took between the protected activity and the termination of his employment. He argues for the first time that these actions, in essence, fill in the four-year gap and establish a continuing pattern of retaliation. Because Honardoost raised this argument for the first time on appeal to the Board, we decline to consider it. *Duprey v. Florida Power & Light*, No. 00-070, ALJ No. 2000-ERA-5, slip op. at 11 n.54 (Feb. 27, 2003); *Hasan v. Wolfe Creek Nuclear Operating Corp.* ARB No. 01-006, ALJ No. 2000-ERA-14, slip op. at 4 n.4 (ARB May 31 2001).